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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-4721

BETTIS CORPORATION and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioners,

versus

CHARLES WHEATLEY COMPANY

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September, 1975

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The petitioners, BETTIS CORPORATION and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, reported in 512 F.2d 486, appears at Appendix A, infra, pp. 1a-11a; a rehearing was denied and reported in 515 F.2d 1184, appears at Appendix B, infra, p. 11a-12a; the lower court, the United States District Court for the Western District of Louisiana, Lafayette Division, rendered judgment without a written opinion, and said judgment appears at Appendix C, infra, p. 13a-14a.

JURISDICTION

The order of the Court of Appeals sought to be reviewed was entered on May 5, 1975. See Appendix A, p. 1a, infra. A rehearing of said judgment was denied by said Court on June 30, 1975 (citation of panel decision, WDLA 512 F.2d 486). See Appendix B, p. 11a, infra. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

The important issue presented for review is whether or not the exclusive remedy provision of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905) bars the claim of an unrelated third party for indemnity or contribution against the employer of its injured employee.

FEDERAL STATUTE INVOLVED

The so-called "exclusive liability" provision of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905) (hereinafter referred to as L&HWC Act), which is involved here, provides, as follows:

> "33 § 905. Exclusiveness of Liability
> "(a) The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to

recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee."

STATEMENT OF FACTS

Petitioner, BETTIS CORPORATION, manufactured a component part, known as an actuator, of a pipeline apparatus which ruptured, causing fatal injuries to Murray White, an employee of CHARLES WHEATLEY COMPANY. Murray White's widow and daughter brought a tort action for damages against Texas Eastern Transmission Corporation, the owner of the pipeline located on an offshore drilling platform in the Gulf of Mexico; Bettis Corporation; and their insurers. Bettis Corporation and its insurer filed a third party complaint against Charles Wheatley Company, Murray White's employer, seeking indemnity or contribution in tort. The United States District Court for the Western District of Louisiana, Richard J. Putnam, J., rendered a final judgment under Rule 54(b), dismissing this third party claim on a motion filed by

Wheatley. On appeal the lower court's judgment was affirmed by the Fifth Circuit Court of Appeals and a rehearing was applied for and denied.

At the time of Murray White's fatal injuries, he was in the process of working on the apparatus assembled by Charles Wheatley Company, which was a part of Texas Eastern's gas transmission line. Murray White's widow has collected Longshoremen's and Harbor Workers' Compensation benefits from the insurer of his employer, Charles Wheatley Company, and said insurer has intervened in this case to recover the amount paid and to be paid in the future. The basis of the lower court's dismissing Bettis' third party action against Wheatley was essentially that Bettis was not entitled to tort indemnity from Wheatley grounded on the so-called "exclusivity provision" of the L&HWC Act.

Federal jurisdiction in the Court of first instance is based on diversity, inasmuch as the plaintiffs were residents of Louisiana and the defendants, Texas Eastern Transmission Corporation, Bettis Corporation and their insurers, were domiciled and had their principal place of business in other States.

REASONS FOR GRANTING WRIT AND ARGUMENT

There are two important reasons for the granting of this writ, viz:

(1) The so-called "exclusivity provision" of the L&HWC Act is for all practical purposes identical with the provisions to the same effect in the Federal Employees Compensation Act (5 U.S.C. § 8116(c)), hereinafter referred to as FECA. In fact the whole pur-

pose of both acts is the same in that they are both Federal Compensation laws designed to give speedy and certain relief to injured workmen or their dependents in the case of death. One, to protect the interest of the longshoremen, and the other, that of Federal employees. A side-by-side comparison of the pertinent provisions of these two acts illustrate this point, viz:

"33 § 905. Exclusiveness of Liability

"(a) The liability of an employer prescribed in Section 904 of this title shall be eclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and *anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death*, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee." (Emphasis ours)

"5 § 8116. Limitations on right to receive compensation

"(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and *any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding*, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel." (Emphasis ours)

Despite the almost identical language used in Section 905 of the L&HWC Act and Section 8116(c) of the FECA, there has been a split in decisions in several of the various Circuits of the Court of Appeals in interpreting this so-called "exclusivity provision" of the FECA in that some courts have allowed third party tort indemnity under facts similar to this case, while others have not.

It is important to note that cases in the Third and Fourth Circuits and one in the Fifth Circuit have allowed indemnity or contribution, whereas cases in the First, Second, Ninth and District of Columbia Circuits have denied it. (12 ALR Fed, § 2[b], p. 620, and § 5 and 6, pp. 624-628)

The Fifth Circuit Court of Appeals in one instance has interpreted the FECA so as to allow indemnity to an unrelated third party (*Sandoval v. Mitsui Sempaku K.K. Tokyo*, 460 F.2d 1163, (1972)), and denied it in L&HWC cases — in this case (512 F.2d 486) and in *Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Service*, 377 F.2d 511 (1967)). See Appendix D, pp. 15a and 16a, for a comparison of these two cases. Petitioners, therefore, submit that because of these conflicts and particularly in the Court of Appeals for the Fifth Circuit, the pending case justifies a review by this Court.

(2) The second important reason a writ should be granted in this case is that the First, Second, Fifth, Ninth and District of Columbia Circuits of the Court of Appeals, in deciding that the "exclusive liability" provision of the L&HWC Act bars recovery by a third party against a negligent employer, is in essence in conflict with applicable decisions of this Court.

In a series of decisions this Court has carefully considered the language of Section 5 of the L&HWC Act (33 U.S.C. § 905), which is nearly identical with the FECA (5 U.S.C. § 8116(c) (formerly 757(b)). See side-by-side quotation of these provisions above. Three cases from this Court bearing on this point are briefly discussed below.

In *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956). This Court held that where the injuries to the longshoremen-employee occurred through the fault of his employer, the third party shipowner has a right to receive full reimbursement from the stevedoring employer, regardless of the existence of the "exclusive liability" provision of the L&HWC Act. This Court made the following comments concerning Section 905 of the L&HWC Act:

> "The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability *of such employer to its employee, or to anyone claiming under or through such employee, on account of his injury or death arising out of that employment.*" (Emphasis by the Court in part, and in part ours)

The words "claiming under or through such employee" are a specific interpretative gloss applied by this Court in its analysis of the exclusive remedy of the L&HWC Act. It is obvious from the opinion as a whole, and from the cited language in particular, that

this Court considers the exclusive remedy provision to apply only to "the employee, and those claiming under or through him." Immediately following that quote, this Court continued:

> "In return, the employee, *and those claiming under or through him*, are given a substantial quid pro quo in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims. On the other, hand, the act prescribes no quid pro quo for a shipowner that is compelled to pay a judgment obtained against if for the full amount of a longshoreman's damages." (Emphasis added)

Again the Court uses the phrases "employee and those claiming under or through him." In the analysis of this Court, the exclusive remedy provisions apply to them specifically in return for their exchange of a guaranteed recovery for possible tort liability.

A reading of the statute itself confirms the interpretation given by this Court in *Ryan*. The exclusive remedy provisions apply to "anyone . . . entitled to recover damages from such employer . . . on account of such injury or death . . ." The employee, and those claiming through him, recover "on account of such injury or death". That is, they recover because of the fact of employment and the fact of injury or death, nothing more. This is the right they have obtained as a result of surrendering their right to bring a tort action. They do not recover "on account of" the negligence of or fault of the employer.

Third parties, or those not claiming under or through the employee, *do not* recover from the employer "on account of such injury or death". To recover from the employer, they must show negligence, fault or the existence of an obligation to indemnify. If they do recover, it will be "on account of" such negligence, fault or indemnity.

Additionally, what this Court said in *Weyerhaeuser Steamship Co. v. U.S.*, (1963) 372 U.S. 597, 10 L. Ed. 2d 1, 83 S.Ct. 926, clearly set out the rationale and guidelines to be followed in this type of case even though it involved Section 757(b), now Section 8116(c) of the FECA. Because of the similarity in the exclusive remedy provisions of both the L&HWC Act and FECA, this reasoning should be applied in the interpretation of Section 905 of the L&HWC Act.

In *Weyerhaeuser* a collision occurred between a dredge owned by the United States and a ship owned by the plaintiff. It was found that the collision was a result of the mutual fault of both parties. A government employee, who was on board the dredge at the time was injured. He received compensation benefits under the FECA, and also brought a tort suit against the plaintiff. The plaintiff settled the case for $16,000.00 and then sought to include the $16,000.00 as part of its damages (in mutual fault ship collision cases, each party is entitled to recover one-half of its damages from the other party).

The United States objected to plaintiff's inclusion of the $16,000.00 as part of its damages on the basis that its sole liability under 5 USCA § 757(b) (now § 8116(c)), was to pay compensation to its injured

employee under the FECA. This Court held that the exclusive liability provision of § 757(b) did not prevent the plaintiff from including the $16,000.00 as a part of its damages. Stated in other terms, this Court held that the Government's obligation to pay compensation benefits to its injured employee under FECA *was not* its exclusive obligation. In reaching its decision, this Court was of the opinion that the purpose of the law (a workmen's compensation law) must be considered. It is a compromise between employers and employees in that it provides swift and assured compensation to the worker who is injured while on the job, regardless of who is at fault, while simultaneously taking away the employee's right to sue in tort and assuring the worker of a much smaller amount of money than he would recover in a tort suit. In *Weyerhaeuser* this Court found that the purpose of the exclusive liability provision (§ 757(b), now § 8116(c)) " — was to establish that, *as between the Government on the one hand and its employees and their representatives or dependents on the other*, the statutory remedy was to be exclusive. *There is no evidence whatever that Congress was concerned with the rights of unrelated third parties* —". (Emphasis ours) (83 S.Ct. 926, p. 929). In this case, this Court makes it clear that Section 757(b) (now § 8116(c)) of the FECA does not provide for the exclusive liability that the Government has to face.

Although the case involves a special rule (divided damages in mutual fault collisions) and thus might be said to be distinguishable from other cases involved § 757(b) of FECA or § 905 of the L&HWC Act, it appears that this Court did not intend for *Weyerhaeuser* to be distinguishable. This intent is illustrated by the fact that the Court compared § 757(b) to its counterpart in

the L&HWC Act and then cites cases in which, despite § 905 of the L&HWC Act, it was held that that section did not abrogate actions by third parties who sought indemnity from the injured worker's employer. See, also, *Federal Marine Term., Inc. v. Burnside Ship Co.*, (1969), 394 U.S. 404, 421, 89 S.Ct. 1144, 1149, 1153, 1154, 22 L.Ed.2d 371.

There have been other cases (not involving mutual fault ship collisions) that specifically follow the holding in *Weyerhaeuser*. These cases make it clear that the holding in *Weyerhaeuser* is not limited to the above mentioned admiralty doctrine.

Drake v. Treadwell Construction Co. v. U.S., (1963) 372 U.S. 772, 10 L.Ed.2d 136, 83 S.Ct. 1102, 299 F.2d 789, is such a case. It clearly shows that it was not this Court's intent to limit its holding in *Weyerhaeuser* to mutual fault ship collision cases. Drake, a Government employee, was injured when an expansion tank manufactured by Treadwell exploded. Drake sued Treadwell, who filed a third party claim against the United States seeking indemnity or contribution. The district court found that Treadwell was at fault and awarded judgment in favor of Drake. *On the third party claim the court found that the United States was also at fault and awarded contribution to Treadwell.* On appeal, the appellate court reversed the award of contribution on the ground that § 757(b) precluded an action by a third party against the Government. Writs were accepted by this Court and vacated the judgment and remanded the case to the district Court for a decision in accord with its holding in the *Weyerhaeuser* case. The district court in order dated May 24, 1963 and

July 9, 1963 specifically ruled that § 757(b) *did not preclude the third party action in which indemnity or contribution was sought.*

Other cases in which the same decision was reached are *Hart v. Simmons*, (1963) 223 F.Supp. 109; *Wallenius Bremen v. U.S.*, (1969) 409 F.2d 994, 12 ALR Fed. 606.

It is the position of petitioners that they should not be denied the right to show that Bettis was only at least technically, passive or secondarily at fault and Charles Wheatley Company was actively and primarily at fault and thereby entitled to indemnity or contribution from Wheatley. It is petitioners' further position that by so allowing indemnity against Wheatley, the ultimate loss is thereby placed upon the actor whose fault caused the injury. As pointed out in several cases, if this is done, the one best able to eliminate the risk is given the greatest incentive to do so. As pointed out in several cases also, it would be wrong to assess damages against a non-negligent or passively negligent defendant for loss or injury suffered solely as the result of active negligence of another party, regardless of the absence of a contractual relationship between the parties. As pointed out by the Court in the case of *Tri-State Oil Tool Indust., Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178, *the right of indemnity is based upon the principle that everyone is responsible for his own negligence and if another person has been compelled by judgment to pay the damages which ought to have been paid by the wrongdoer, they may recover from them.* This right exists independent of statute and whether or not contractual relations exist between the parties, and

whether or not the negligent person owed the other a special or particular legal duty not to be negligent. The Court in the *Tri-State* case quoted with approval from Prosser on Torts, the following:

> " 'In Prosser on Torts, § 48 at 279 (3d ed.), it is said:
>
> " '*The right to indemnity may, * * * arise without agreement, and by operation of law to prevent a result which is regarded as unjust or unsatisfactory.* Although the ancient specious argument that the courts will not aid one tortfeasor against another because no one should be permitted to found a cause of action on his own wrong, would appear to apply quite as fully to indemnity as to contribution, the courts have been much more disposed to reject it where indemnity is involved.
>
> " 'Thus it is generally agreed that there may be indemnity in favor of one who is held responsible solely by imputation of law because of his relation to the actual wrongdoer, as where an employer is vicariously liable for the tort of a servant or an independent contractor; or an innocent partner or carrier is held liable for the acts of another, or the owner of an automobile for the conduct of the driver . . .
>
> " '*The principle is not, however, limited to those who are personally free from fault. * * * Again, it is quite generally agreed that there*

may be indemnity in favor of one who was under only a secondary duty where another was primarily responsible * * *." (Emphasis added)

Tri-State Oil Tool Indust., Inc. v. Delta Marine Drilling Co., 410 F.2d 178, at p. 182.

Based on the above cases, this Court should grant a review to affirm that the absence of a contractual relationship between vessels in collision cases should not alter the principles expressed in the existing Federal Compensation Act cases in regard to Congressional intention in passing these statutes. As the Government argued in this Court in the *Ryan* case, "the Compensation Acts, in conferring immunity on the employer from common lawsuits by the employee and his dependents did not mean to free the employer from suits by outsiders."

CONCLUSION

In view of the conflict in the various Circuits of the Court of Appeals and the apparent failure of the lower courts to follow the lead set by this Court in *Ryan*, *Weyerhaeuser* and other decisions, and the fact that fundamental injustice will result if the position taken by the Fifth Circuit Court of Appeals in this case is maintained, it is respectfully submitted that a writ of review should be granted in this case.

Respectfully submitted,

PUGH, BOUDREAUX
& GACHASSIN,
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September ____, 1975.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of September, 1975.

NICHOLLS PUGH, JR.

APPENDIX A

United States Court of Appeals
Fifth Circuit
Office of the Clerk

May 5, 1975

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW NO. 74-1667 WHITE V. CHARLES WHEATLEY COMPANY

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41 of the Federal Rules of Appellate Procedure govern costs, petitions for rehearing and mandates, respectively. Local Rule 15 has been amended to provide: "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to the recent amendment to Local Rule 7 which now provides: "Appointed counsel shall, in the event

of affirmance of other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH,
CLERK
/s/ ANNE G. PARENT

enc.

cc: Mr. Timothy J. McNamara
Mr. Nicholls Pugh, Jr.
Mr. Bob F. Wright
Mr. Fred H. Sievert, Jr.
Mr. James Nieset

Albra Christine WHITE, Individually, etc., et al., Plaintiffs,

versus

TEXAS EASTERN TRANSMISSION CORPORATION et al., Defendants.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY and the Bettis Corporation, Defendants-Third-Party Plaintiffs-Appellants,

Texas Eastern Transmission Corporation

and

The Fidelity and Casualty Company of New York, Defendants-Third-Party Plaintiffs,

versus

CHARLES WHEATLEY COMPANY, Third-Party Defendant-Appellee,

Vinson Supply Company, Third-Party Defendant,

Home Insurance Company, Intervenor.

No. 74-1667.

United States Court of Appeals, Fifth Circuit.

May 5, 1975.

Appeal from the United States District Court for the Western District of Louisiana.

Before WISDOM and SIMPSON, Circuit Judges, and NICHOLS*, Associate Judge.

SIMPSON, Circuit Judge:

Murray Granvil White, an employee of the Charles Wheatley Co. (Wheatley), was fatally injured when component parts of a Wheatley Univalve Launch Package[1] upon which he was working exploded. The launch package had been sold by Wheatley to Texas Eastern Transmission Corporation (Texas Eastern) and was installed on a fixed offshore drilling platform located in Block 280 of the Gulf of Mexico offshore of Cameron, Louisiana. White's widow and daughter were entitled to and received compensation from Wheatley's insurance carrier in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S.C. § 901 et seq. (hereinafter "L & H").[2]

Also instituted by White's survivors was the present litigation, a civil tort action for damages against

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* Of the United States Court of Claims, sitting by designation.

1 The Univalve Launch Package was part of an apparatus used for cleaning moisture from within natural gas transmission lines connecting offshore drilling platforms. The launcher would disgorge 24 inch balls known as "pigs" into the gas transmission lines when actuated. The actuator, (a "pig launcher" in oil field vernacular) among other uses, opens and closes oil field valves, or actuates them. At the time he sustained his fatal injuries, Murray White was installing a device that would automatically release the balls at predetermined intervals. It is our understanding that the launch system had theretofore required manual operation of the actuator.

2 The Outer Continental Shelf Lands Act, Title 43, U.S.C. § 1331 et seq., provides that the compensation law applying to injuries on these fixed, offshore drilling platforms is that specified in the L & H Act, 43 U.S.C. § 1333(c).

Texas Eastern and against the Bettis Corporation, manufacturer of the actuator valve incorporated in the Wheatley launch system.[3]

Bettis Corporation and its insurer, St. Paul Fire and Marine Insurance Company (hereafter collectively referred to as "Bettis") filed third party complaints against Wheatley.[4] Bettis' primary position is that it is entitled, in the event of a judgment holding it liable for damages to White's survivors, to contribution or to indemnity in tort for all or part of such damages.[5]

Wheatley moved to dismiss Bettis' third-party complaint on grounds that the exclusivity provision of L & H, Title 33, U.S.C. § 905, as construed by this court,

---

3 The Wheatley launch system was assembled from a number of component parts, some of Wheatley's manufacture and others purchased by Wheatley from independent suppliers such as Bettis Corporation.

4 A third party claim against Wheatley was also filed by Texas Eastern and, subsequently, by the Vinson Supply Company (Vinson). The third-party complaint of Texas Eastern alleged a contractual right to indemnity based on language appearing on the purchase order forms executed between Texas Eastern and Wheatley. Wheatley made no motion to dismiss Texas Eastern's complaint, and its viability is not now an issue before this court.

Vinson Supply Company, like Bettis, was a supplier of component parts for the Wheatley-assembled launch system. Vinson's third party complaint against Wheatley was filed after the entry of judgment against Bettis on its third-party complaint and before this appeal was taken. The district court has withheld disposition of the Vinson complaint pending our decision in this appeal.

5 Bettis also claimed the right to indemnity based on Wheatley's breach of an implied warranty that it would use the Bettis supplied equipment only in accordance with the specifications and recommendations supplied by Bettis. This is an apparent attempt to invoke the right of indemnification recognized in Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, in a non-vessel oriented context. We clearly rejected any such attempts in Ocean Drilling and Exploration Co. v. Berry Bros. Oilfield Service, Inc., 5 Cir. 1967, 377 F.2d 511, 513 & n.3, cert. denied, 1967, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118.

precludes such indemnity claims against an employer. The district court entered a Rule 54(b) F.R.Civ.P. order granting Wheatley's motion to dismiss, and this appeal followed. For the reasons advanced below, we affirm the order of the district court.

Our discussion necessarily begins, and to all effective intents and purposes, ends, with Ocean Drilling and Exploration Co. (ODECO) v. Berry Bros. Oilfield Service, Inc., 5 Cir. 1967, 377 F.2d 511, cert. denied 1967, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (*ODECO*). In that case, employees of Berry Bros. were injured while performing repair work on an offshore drilling platform owned by ODECO. The injured employees received L & H compensation from their employer, and also filed suits in tort against ODECO alleging ODECO's negligence in failing to furnish a safe place to work. ODECO in turn filed a third-party complaint for indemnity in tort and contract against Berry Bros. The district court granted Berry Bros.' motion to dismiss the third-party complaint, and we affirmed on appeal.

After disposing of ODECO's claimed contractual right to indemnity (see note 5, supra), we turned to a consideration of the very issue which is again before us today: "whether a claim for indemnity remains available to ODECO [by analogy, here to Bettis] under maritime tort principles." 377 F.2d at 513. We held, after citing the exclusive liability provision of L & H, 33 U.S.C. § 905,[6] as follows:

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6 Title 33, U.S.C. § 905, prior to the 1972 amendment, read as follows:

§ 905. *Exclusiveness of liability.*

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other lia-

It is thus apparent that the Act's exclusive liability provision effectively abrogates any independent tort liability of the employer to its employees, *thereby eliminating any basis which may have existed for indemnification on a tort theory*. Thus, while the employer may continue, even in spite of the exclusive liability provision of the Act, to remain liable for indemnity on the basis of an express or implied contractual obligation, in the absence of such obligation, as here, there simply exists no underlying tort liability upon which to base a claim for indemnity against the employer. See United Air Lines, Inc. v. Wiener, 9th Cir. 1964, 335 F.2d 379, 402-404, cert. dismissed, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549; Halliburton Co. v. Norton Drilling Co., supra, 302 F.2d [431] at 434; Brown v. American-Hawaiian S.S. Co., 3d Cir. 1954, 211 F.2d 16, 18; American Mut. Liab. Ins. Co. v. Matthews, 2nd Cir. 1951, 182 F.2d 322, 323-336.

377 F.2d at 514-515. (Emphasis added)

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bility of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (Mar. 4, 1927, ch. 509, § 5, 44 Stat. 1426.)

The effective date of the 1972 amendments to L & H was after the institution of this action below, and the amendments do not enter into the disposition of this appeal. But, for the legislative history of the amendments see 1972 U.S. Code Cong. and Admin. News, p. 4698 et seq.

Without more, this would seem to end the matter. For, it is clear from a reading of *ODECO* and other cases[7] that there must be some underlying tort liability predicated on a breach of the employer's duty in order for a right of indemnity to arise in a third party. Here, the only breach of duty — and the only resulting theoretical liability — of Wheatley that could be asserted was a duty owed to its employee to assemble the launch package in a non-negligent manner so as to prevent injury to the employee. It is clear beyond doubt under *ODECO* that § 905 of L & H has extinguished this liability in favor of a compensation scheme. Thus, there remains no underlying tort liability to support Bettis' indemnity claim.

Appellants present an argument by analogy with cases decided under the exclusive liability provision of the Federal Employees' Compensation Act (FECA), Title 5, U.S.C. § 8116(c), because of the similarity of the language of FECA to that of L & H. We reject application of these decisions as inapposite to our decision of this appeal for reasons we will briefly set forth.

In the first place, conceding the persuasiveness of such cases in the absence of an authoritative construction of § 905 of L & H, such a situation is simply not present. Secondly, the Supreme Court decisions which have permitted some forms of indemnity under § 8116(c) of FECA may be distinguished on their facts

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7 See, e. g. Loffland Brothers Co. v. Roberts, 5 Cir. 1967, 386 F.2d 540, cert. denied 1968, 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed.2d 830; Drewery v. Daspit Brothers Marine Divers, Inc., 5 Cir. 1963, 317 F.2d 425.

from the instant controversy.[8] Finally, the lower federal courts are themselves divided as to the proper interpretation of § 8116(c) of FECA as applied to tort indemnity claims.[9]

Likewise without merit is appellant's further contention that the precedential vitality of *ODECO's* clear holding has been eroded by subsequent decisions in this circuit.[10] Very recently, in Aetna Casualty & Sure-

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8 In Weyerhaeuser S.S. Co. v. United States, 1963, 372 U.S. 597, 83 S.Ct. 926, 10 L.Ed.2d 1, the Court held that the exclusive liability provision of FECA yielded to the time-honored rule of divided damages in mutual fault admiralty collision cases. The Court indicated that it considered this result dictated by Congress' expressly providing in the Public Vessels Act, Title 46, U.S.C. § 781 et seq., that the United States be liable just as private shipowners in mutual fault collision cases.

In Treadwell Const. Co. v. United States, 1963, 372 U.S. 772, 83 S.Ct. 1102, 10 L.Ed.2d 136, the Court simply vacated a holding of the court of appeals and remanded for further consideration by the district court the question whether § 8116(c) barred indemnity claims where the Federal Tort Claims Act, Title 28, U.S.C. § 2671 et seq., was applicable in the light of the Court's holding in *Weyerhaeuser*.

These cases are not dispositive of the L & H exclusivity issue before us here.

9 *See*, Annot., 12 A.L.R.Fed. 616, §§ 5 and 6 (1972) (Supp. 1974), for a collecting and analysis of the divergent views on the reach of FECA's exclusive liability provision.

10 Appellant cites Sandoval v. Mitsui Sempaku K.K. Tokyo, 5 Cir. 1972, 460 F.2d 1163, and Loffland Bros. Co. v. Roberts, 5 Cir. 1967, 386 F.2d 540, cert. denied 1968, 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed.2d 830, in support of his argument. *Sandoval* involved the FECA and need not detain us. See nn. 8-9 and accompanying text, supra. In *Loffland* an employee of a casing contractor was injured in the course of well drilling on an offshore platform similar to the location of Murray White's fatal injury. In *Loffland*, Roberts, an injured employee of a casing company, brought suit against Loffland Bros., the drilling contractor, for damages, and Loffland Bros. filed a third-party claim for indemnity against O. D. Casing Crews, Inc., Roberts' employer. The district court dismissed the third-party complaint and we affirmed without referring to the exclusive liability provision of L & H. We found, instead, that the third party claim for tort indemnity could not stand because there

ty Co. v. Service Contracting, Inc., 5 Cir. 1973, 490 F.2d 299, we adhered to the rule of *ODECO* in unmistakable language:

> [H]aving paid workmen's compensation to Laster in accordance with the exclusive liability provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., Service Contracting was not subject to any independent tort liability to its employees. Without this underlying tort liability, Service Contracting could not have been liable for indemnity in the absence of a written contract. Ocean Drilling & Exploration Co. v. Berry Brothers Oil Field Service, Inc., 377 F.2d 511 (5th Cir.), cert. denied, 389 U.S. 849 [88 S.Ct. 102, 19 L.Ed.2d 118] (1967). *See* General Electric Co. v. Cuban American Nickel Co., 396 F.2d 89 (5th Cir. 1968); Halliburton Co. v. Norton Drilling Co., 302 F.2d 431 (5th Cir. 1962).
>
> 490 F.2d at 300-01.

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was no evidence in the record of any negligence on the part of the casing company other than the negligence of the injured employee. Under the doctrine of Drewery v. Daspit Bros. Marine Divers, Inc., 5 Cir. 1963, 317 F.2d 425, we declined to impute the employee's negligence, which resulted only in injuries to the employee himself, to his employer. There was, therefore, no underlying tort liability upon which Loffland Bros. could base its claim for indemnity.

We do not read this court's reliance on a pre-existing common law rule rather than on the exclusive liability provision of L & H, never mentioned in the opinion, as an implicit retreat from the holding in *ODECO*. Indeed the theory of indemnity in both *ODECO* and *Loffland Bros.* is the same: absent some underlying tort liability of the employer, there can be no third-party claim for tort indemnity against the employer. That the court in *Loffland Bros.* elected to apply this theory under common-law principles rather than under the exclusive liability provision of the L & H is of little significance in assessing *ODECO*'s continuing potency as precedent.

Guided by such undeviating precedent from this court, the district court was clearly justified in its dismissal of Bettis' third-party claim for tort indemnity against Wheatley.

Affirmed.

APPENDIX B

United States Court Of Appeals
Fifth Circuit

Office of the Clerk

June 30, 1975

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

TO ALL COUNSEL OF RECORD

No. 74-1667 - Albra Christine White, Etc., Et Al. vs. Texas Eastern Transmission Corp., Et Al.; St. Paul Fire and Marine Insurance Co. and the Bettis Corp.; Texas Eastern Transmission Corp. and the Fidelity & Casualty Co. of New York vs. Charles Wheatley Co.; Vinson Supply Co.; Home Insurance Co.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ BARBARA KREI
Deputy Clerk

cc: Mr. Timothy J. McNamara
Mr. Nicholls Pugh, Jr.
Mr. Bob F. Wright
Mr. Fred H. Sievert, Jr.
Mr. James Nieset

APPENDIX C

Filed: Nov. 15, 1973

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

ALBRA CHRISTINE WHITE,
INDIVIDUALLY, ETC.

versus C.A. No. 17,994

TEXAS EASTERN TRANSMISSION
CORPORATION, ET AL

ORDER MAKING EXPRESS
DETERMINATION UNDER RULE 54(b)

Defendants, ST. PAUL FIRE AND MARINE INSURANCE COMPANY and BETTIS CORPORATION, having applied in open court on the 7th day of November, 1973, for an order expressly directing the entry of final judgment on the order of this Court dated the 7th day of November, 1973, upon an express determination that there is no just reason for delay, and the Court having heard oral argument in support of the said application, and in opposition thereto, and due deliberation having been had thereon, it is, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, hereby

Determined that there is no just reason for delay in the entry of final judgment herein on the order of this

Court dated November 7, 1973, sustaining the motion by CHARLES WHEATLEY COMPANY to dismiss the third party complaint of ST. PAUL FIRE AND MARINE INSURANCE COMPANY and the BETTIS CORPORATION, and it is

ORDERED that such final judgment be entered herein forthwith.

Lafayette, Louisiana this 15th day of November, 1973.

/s/ R. J. PUTNAM
UNITED STATES DISTRICT
JUDGE

APPROVED:
DAVIDSON, MENOX, ONEBANE & DONOHOE,
ATTORNEYS FOR
CHARLES WHEATLEY COMPANY

TIMOTHY J. McNAMARA

APPENDIX D

Sandoval v. Mitsui Sempaku K.K. Tokyo, 460 F.2d 1163, (1972, 5th Cir.) (Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges)

A shipowner sued by an employee of the Panama Canal Company, in a third party action sought indemnity from the employer of the plaintiff. Mitsui, the shipowner was not guilty of any conduct sufficient to preclude recovery.

After finding Ryan indemnity, the Court stated:

"[6] — *Mitsui is likewise* entitled to indemnity from the Canal Company on a tort indemnity basis because *the Company violated a duty owed directly to the shipowner to exercise reasonable care to avoid the foreseeable harm of the shipowner's liability to Sandoval*. See Tri-State Oil Tool Indus., Inc. v. Delta Marine Drill. Co., 5 Cir., 1969, 410 F.2d 178, noted 44 Tul.L.Rev. 557, and cases cited therein. See also Federal Marine Term., Inc. v. Burnside Ship. Co., 394 U.S. 404, 421, 89 S.Ct. 1144, 1153-1154, 22 L.Ed.2d 371 (1969).

"[7] — Finally, the District Court concluded that Mitsui was foreclosed from seeking indemnity because the Federal Employees Compensation Act is the exclusive remedy available against the Company for

Ocean Drilling & Exp. Co. v. Berry Bros. Oilfied Service, 377 F.2d 511, (1967, 5th Cir.) (Before GEWIN, THORNBERRY and DYER, Circuit Judges)

An offshore platform owner sued by two employees of a repair contractor in a third party action, sought recovery by way of indemnity from the employer of the two plaintiffs. One of the main issues was "whether a claim for indemnity remains available to ODECO under maritime tort principles." (p. 513)

The Court made the following statement and conclusion:

"[3, 4] — Even assuming, however, as alleged in the third-party complaint, that any negligence on the part of ODECO was merely passive or secondary in character, we are nevertheless compelled to conclude that ODECO's claim for indemnity, not being based upon the violation of a contractual obligation, must fail under maritime law. Here, the injured claimants were entitled to and did, in fact, receive benefits from Berry Bros. under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., their injuries having occurred on a platform located above the Outer Continental Shelf in the Gulf of Mexico. *Section 5 of that Act*

those entitled to benefits of the Act. *This identical argument was rejected by the Supreme Court in Weyerhaeuser Steamship Company v. United States*, 372 U.S. 597, 601-604, 83 S.Ct. 926, 929-930, 10 L.Ed.2d 1 (1963). See also Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956)."

(Emphasis ours) (pps. 1168-1169)

TORT INDEMNITY GRANTED

expressly states that its compensation provisions are exclusive of any other liability of an employer to its employees —

"— It is thus apparent that the Act's exclusive liability provision effectively abrogates any independent tort liability of the employer to its employees, thereby eliminating any basis which may have existed for indemnification on a tort theory. —"

(Emphasis ours) (p. 514)

TORT INDEMNITY DENIED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-472

BETTIS CORPORATION and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioners,

versus

CHARLES WHEATLEY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-472

BETTIS CORPORATION and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioners,

versus

CHARLES WHEATLEY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

TO THE HONORABLES, THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

For the reasons hereafter set forth, CHARLES WHEATLEY COMPANY, third party defendant-appellee prays that this Honorable Court refuse the writ of certiorari sought by petitioners.

STATEMENT OF THE CASE

These proceedings were instituted by the wife and child of Murray White, an employee of Charles Wheatley Co., (Wheatley) who was killed due to an explosion on a fixed platform in the Gulf of Mexico upon which he was working. In suing Bettis Corporation, the plaintiff alleged that the explosion resulted from a defect in an "actuator" manufactured by Bettis Corporation, which constituted a component part of what is known as a "Wheatley Univalve Launch Package", an apparatus designed to clean moisture from within natural gas transmission lines connecting offshore drilling platforms. This particular launch package, which was assembled by Wheatley, was sold to Texas Eastern Transmission Corporation (Texas Eastern) and was installed on its offshore fixed platform. White's widow and child are presently collecting compensation benefits to which they were and are entitled under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S.C. Sections 901 et seq. (L & H W Act) from appellee herein, Wheatley. They also instituted an action in tort for damages against Texas Eastern and the Bettis Corporation, the latter party having manufactured the allegedly defective actuator valve incorporated in the launch system.

Bettis and its insurer, St. Paul Fire & Marine Insurance Company, filed third-party complaints against Wheatley, seeking indemnity or contribution in tort in the event that they should be held liable to White's survivors on the principal demand. The trial court, however, entered a Rule 54 (B) FRCP Order

granting Wheatley's motion to dismiss the third-party complaint from which dismissal Bettis and its insurer appealed to the United States Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the trial court's dismissal of the third-party complaint, prompting Bettis and its insurer to make application to this Honorable Court for a writ of certiorari.

QUESTION PRESENTED

The only issue presented by this application is whether the third party claims for tort indemnification or contribution brought by appellants should be barred by the exclusive remedy provisions of the L & H W Act.

REASONS FOR REFUSING WRIT OF CERTIORARI

A. The exclusion provisions of Title 33 U.S.C. 905 of the L & H W Act bar third party claims against an employer.

In constructing an argument in opposition to the application for writs of certiorari, the writer begins with the exclusionary provisions of the L & H W Act. Title 33 Section 905 contained (prior to the 1972 amendment) the following pertinent language.

> "The liability of an employer prescribed in Section 904 of this Title *shall be exclusive and in place of all other liability* of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, *and anyone otherwise*

entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . ." (Due to the time at which this death occurred, the 1972 amendments are not applicable to this case. However, this particular provision was not amended or changed by the 1972 Legislation.)

The language "and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death" is without doubt sufficient to cover claims brought by third party tort feasors such as Bettis which arise out of the death or injury of the employee. The immunity provided for in Title 33 U.S.C. Section 905, cannot be limited to actions brought by employees, their legal representatives, relatives, dependents and survivors, etc., without rendering the clause just quoted purposeless. To read the statute so narrowly would impute to Congress an intent to write into it a meaningless provision which would operate as mere surplusage. It is a fundamental principle of statutory construction that all provisions of a statute are presumed to have a purpose and when the language of a statute is clear and unambiguous its provisions should be given effect. It is respectfully submitted that the exclusionary provisions of the L & H W Act construed together clearly mean what their language unambiguously and unequivocally suggests — that an employer is to be wrapped with complete immunity from any and all actions arising out of or in any manner connected with the death of his employee, whether they be instituted by the employee, his

representatives, relatives, survivors, etc., or by third-party claimants seeking indemnification or contribution in tort.

The obvious intent of the L & H W Act is to provide the injured employee (or his survivors in case of death) with a remedy against his employer regardless of where the fault for his injuries lies. In return for giving up the right to resist recovery by its employee for job-related injuries, the employer is vested with immunity from all actions brought by the employee, his survivor, dependents, legal representatives, etc., or by third parties which arise out of or are related to the job injury. See, *Cooper Stevedoring Company v. Fritz Kopke, Inc., et al, 94 S. Ct. 2474 (1974)*; see, also, *Nations v. W. W. Morris and American Motorists Insurance Company, 483 F. 2d 577 (1973), cert. den.* To permit complete or partial reimbursement of third party tort feasors at the expense of employers who are also bound to make compensation payments to their injured employees would subvert the exclusiveness of remedy provisions of the L & H W Act. Such an employer would be in the untenable position of having to pay not only the compensation claims of his employee, but the claims for reimbursement by third party tort feasors. The aims of the act designed and implemented to limit the liability of the employer for work-related injuries sustained by his employees to the payment of compensation benefits would be indirectly circumvented by third-party claimants seeking tort indemnification or contribution.

In passing the L & H W Act, Congress recognized the tremendous burden of employers who in the course of their large scale operations are often subjected to

claims for job-related injuries brought by employees. Accordingly, Congress enacted the exclusionary provisions referred to in order to lighten this burden. It is respectfully submitted that to permit recovery on the part of third party plaintiffs herein against the employer would thwart the intent of Congress by allowing circumvention of the exclusionary provisions of the L & H W Act which provisions are grounded on considerations of sound policy.

B. Jurisprudence.

The jurisprudence is well-settled that inasmuch as the L & H W Act immunizes employers from any tort liability in connection with the injuries or deaths of their employees then *ipso facto* employers cannot be held liable to third party claimants on the basis of any negligence on their part which may have contributed to the death of the employee. See, *Loffland Brothers Company v. Roberts, 386 F. 2d 540; Ocean Drilling & Exploration Company v. Berry Brothers Oilfield Service, 377 F. 2d 511 (ODECO).*

In fact the Fifth Circuit in deciding the instant case against third party claimants relied expressly upon the ODECO case. In ODECO, employees of Berry Brothers injured while performing repairs on an off-shore drilling platform owned by ODECO, filed actions in tort against ODECO alleging the latter's failure to furnish a safe place to work as causative of their injuries. At the same time the injured employees received L & H W compensation benefits from Berry Brothers to which they were entitled. ODECO third partied Berry Brothers, the employer of the injured employees. The Fifth Circuit, affirmed the trial court's

dismissal of the third party complaints. The court there said,

> "It is thus apparent that the Act's exclusive liability provision effectively abrogates any independent tort liability of the employer to its employees, thereby eliminating any basis which may have existed for indemnification on a tort theory. Thus while the employer may continue, even in spite of the exclusive liability provision of the act, to remain liable for indemnity on the basis of an express or implied contractual obligation, in the absence of such obligation, as here, there simply exists no underlying tort liability upon which to base a claim for indemnity against the employer." (Citing *United Air Lines, Inc. v. Wiener, 9th Cir., (1964), 355 F. 2d 379, 402-404, cert. den.; Halliburton Company v. Norton Drilling Company, 302 F. 2d 431 at 434; Brown v. American-Hawaiian S. S. Company, 3rd Cir. (1954), 211 F. 2d 1618; American Mutual Liability Insurance Company v. Matthews, 2nd Cir. (1951), 18 F. 2d 322, 323-336). 377 F. 2d at 514-515.*

The Fifth Circuit in the instant case was also impressed with a more recent statement of the foregoing rule announced in ODECO set forth in *Aetna Casualty & Surety Company v. Service Contracting, Inc., 5th Cir. (1973), 490 F. 2d 299.* There the Court said that having paid workmen's compensation to the employee in accordance with the exclusive liability provisions of the L & H W Act, Service Contracting

was not subject to any independent tort liability to its employees. Without this underlying tort liability, Service Contracting could not have been liable for indemnification in the absence of a written contract. (Citing *ODECO*, and *General Electric Company v. Cuban American Nickel Company, 396 F. 2d 89, 5th Cir. (1968)* and *Halliburton supra*.

The breadth of the immunity afforded employers by the exclusionary provisions of the L & H W Act was recently recognized by the Fifth Circuit in *Nations v. W. W. Morris and American Motorists Insurance Company, supra*. In that case the plaintiff alleged that he was entitled to a remedy in tort against his co-employee whose negligence was alleged to have caused him injury while he was working on an oil drilling platform in the Gulf of Mexico. Although the case involved a claim by one employee against another, the court made the following pronouncement which is applicable to the instant case.

> "Sections 905 A [Section 905 A is the same as Section 905 before the 1972 amendments. The exclusive remedy provisions before and after the amendments to the act are the same] and 933 (I) of the L & H completely obliterates the rights of common, civil or maritime law *against employer and fellow employee*. Congress in its unlimited power has determined that the relationship gives rise *only to compensation liabilities*. The nature of the obligation is that there is *no* — the word is no — obligation."
>
> . . .

"Here there is no gap — not even a tiny one. L & H is complete and self-sufficient. It affords specific rights by imposing specific responsibilities. In return for sometimes *awesome obligations* it extends to the employer and fellow employees an *absolute* civil immunity." (Emphasis added.)

Although it is impossible to prove a negative, namely that no law exists to support any such claim for indemnity upon the employer who is otherwise clothed by the immunity provisions of the L & H W Act, still we do have some additional guides in the jurisprudence of a positive nature in the Fifth Circuit decision of *General Electric Company v. Cuban-American Nickel Company, 396 F. 2d 89 (C.A. 5, 1968).* In that case, one Salvadore Locicero, an employee of GE, sued the Cuban-American Nickel Company for personal injuries arising out of an industrial accident at the company's metal recovery plant in Port Nickel, Plaquemines Parish, Louisiana. Locicero, at the time of the accident, was working as an electrician for GE and a member of its repair crew. He was dispatched to the switching station at Port Nickel to repair certain equipment GE had warranted. Cuban-American was in possession and control of the plant and, of course, the switching station, and had an electrical engineer and several electricians in its employ. On the day in question the repair party was admitted to the premises at Port Nickel and escorted to the switching station by the Cuban-American employee charged with responsibility for the station. The employee un-

locked the gate to the fence surrounding the station and unlocked the door to the building containing the electrical equipment to be repaired, gave the repair party a diagram of the wiring of the station, and assured the repair party that it could safely work on the equipment because the station had been de-energized. Unfortunately for Mr. Locicero, it was not. He thereupon brought a negligence action against Cuban-American and Cuban-American in turn third-partied GE, the manufacturer of the equipment and the direct employer of Mr. Locicero. Note here that Cuban-American was the vendee of GE with all of the usual warranties of implied fitness of the product flowing from GE to Cuban-American. The Court found that the plaintiff Locicero was not negligent, that Cuban-American was negligent but that its negligence was passive while GE's negligence was active so that accordingly the District Court entered judgment for complete indemnity in favor of the vendee, Cuban-American against the manufacturer and vendor, GE. GE appealed contending that the exclusive remedy provision of the Louisiana Workmen's Compensation Act completely precluded either indemnity in tort or indemnity based on the breach of an implied contractual obligation. In an extensive and lengthy opinion reviewing not only the Louisiana authorities interpreting the immunity provision of the Louisiana Workmen's Compensation Act, but also maritime authorities on the efficacy of the immunity afforded by the L & H W Act to employers offshore (such as *ODECO* and *Loffland Brothers* cases cited *supra*), the Fifth Circuit concluded absolutely and unequivocally that the Lower Court was wrong in granting indemnity in favor of Cuban-American and against GE in

spite of the fact that Cuban-American was GE's vendee for whom GE was performing services under contract at the time Locicero, GE's employee, was injured.

To this point, the writer has relied exclusively on Circuit Court of Appeals decisions to buttress the argument that the application should be denied. It is suggested, however, that there is a line of cases dealing with the availability of the remedy of contribution in non-collision maritime cases decided by this Honorable Court which supports the contentions of appellee herein. These cases imply that the exclusion provisions of the L & H W Act are broad enough to eliminate the third party claims filed herein.

In *Halycon Lines v. Haenn Ship Sealing & Refitting Corporation, 342 U.S. 282, 72 S. Ct. 277 (1952)* a ship repairman employed by Haenn sued Halycon for injuries incurred while he was repairing Halycon's ship, alleging negligence and unseaworthiness. Because the plaintiff was eligible for compensation benefits under the L & H W Act, he had no action against his employer, Haenn. However, Halycon brought a third party action against Haenn, the employer, alleging that it was entitled to contribution, alleging in effect that the employer was along with it a joint tort feasor. As of 1952 the rule allowing contribution among joint tort feasors in collision maritime cases had not been extended to non-collision maritime cases. This Honorable Court, with Justice Black speaking for the majority, refrained from allowing contribution, citing numerous factors. The opinion did indicate that the majority was influenced by

the fact that Congress had "made fault unimportant in determining the employer's responsibility to his employee" and "made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk and by creation of a statutory schedule of compensation." 72 S. Ct. 277 at 280.

In a per curiam opinion rendered in *Atlantic Coast Line Railroad Company v. Erie Lackawanna Railroad Company, 92 S. Ct. 1550 (1972)*, this court held in a non-collision admiralty case that the District Court had properly dismissed a third party tort feasor's claim for contribution against an injured brakeman's employer. In so holding this Honorable Court relied upon its decision in *Halycon*.

In *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc., et al, 1974 AMC 537*, this Honorable Court granted writs for the purpose of extinguishing the confusion then existing as to whether there was contribution in non-collision admiralty cases and in doing so made some statements which are particularly applicable to the case sub judice.

In that case, the plaintiff, a longshoreman employed by Mid-Gulf Stevedores, was injured while loading cargo in a vessel owned and operated by Fritz Kopke under a time charter to Alcoa Steamship Company. The ship had been initially loaded with crates of cargo by employees of another Stevedore, Cooper Stevedoring Company, in Mobile, Alabama. The ship sailed to Houston where the plaintiff was injured when loading cargo on top of the crates. The plaintiff sued Kopke

and Alcoa (the vessel) to recover damages for his injuries. The vessel third partied Cooper seeking contribution. The trial court, after finding that the vessel was unseaworthy and that Cooper's employees had negligently stowed the crates, divided the damages between them and in effect granted the vessel's claim for contribution.

Cooper appealed, alleging that the District Court had erred in permitting contribution in a non-collision maritime case. The Fifth Circuit rejected the latter argument holding that the apparent prohibition against contribution in non-collision maritime cases announced in *Halycon* and *Atlantic Coast Line*, applied only where the joint tort feasor against whom contribution is sought is immune from tort liability by statute. The Fifth Circuit cited *Horton & Horton, Inc. v. T/S J. E. Dyer, 428 F. 2d 1131 (5th Cir. 1970), cert. den., 400 U.S. 993, 91 S. Ct. 461, (1971); Watz v. Zapata Offshore Company, 431 F. 2d 100 (5th Cir. 1970);* In Re *Seaboard Shipping, 449 F. 2d 132 (2d Cir. 1971); cert. den., 406 U.S. 949, 92 S. Ct. 2039, (1972)*). The court added,

> "Sessions [the injured employee], in addition to suing the vessel, could have proceeded directly against Cooper Stevedoring [third party defendant] as Cooper was not his employer, and therefore, *not shielded by the limited liability of the Longshoremen's and Harbor Workers' Act.*" *479 F. 2d 1041 at 1042.*

The obvious inference from this latter statement is that the L & H W Act confers statutory immunity on employers against claims for contribution and indem-

nification (indemnification being "only an extreme form of contribution" as recognized by the admission of counsel for Bettis and its insurer, in his rebuttal brief filed with the Fifth Circuit Court of Appeals, page 1.).

On certiorari this Court affirmed the Fifth Circuit. In permitting contribution against Cooper Stevedoring Company this Court distinguished the *Halycon* and *Atlantic* cases on the ground that they involved third party actions against employers who were immune from direct action by their employees under the L & H W Act. With reference to the *Halycon* case in particular, the court said,

> "The Court [in Halycon] . . . took cognizance of the apparent trade-off in the Act between the employer's limitation of liability and the abrogation, in favor of the employee, of common-law doctrines of contributory negligence and assumption of risk. (Citations omitted) Confronted with the possibility that *any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act* between the interests of carriers, employers, employees and their respective insurers, we refrained from allowing contribution in the circumstances of that case."

> "*These factors underlying our decision in Halycon still have much force.* Indeed, the 1972 amendments to the Harbor Workers' Act re-emphasized Congress' determination that

> as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy. But whatever weight these factors were properly accorded in the factual circumstances presented in *Halycon*, they have no application here. Unlike the injured worker in *Halycon*, Sessions was not an employee of Cooper and could have proceeded against the vessel or Cooper or both of them to recover full damages for his injury. Had Sessions done so, either or both of the defendants could have been held responsible for all or part of the damages. Since Sessions could have elected to make Cooper bear its share of the damages caused by its negligence, we see no reason why the Vessel should not be accorded the same right. On the facts of this case, then, *no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tort feasors.*" *94 S. Ct. 2174 at 2178.* (Emphasis added)

Without belaboring the point it is sufficient to conclude that this Honorable Court recognized in *Cooper Stevedoring* that the legislation, the jurisprudence and "countervailing" considerations of sound policy indicate that the exclusive remedy provisions of the L & H W Act clearly immunize employers from all actions in tort stemming from job related injuries, (fatal or non-fatal) sustained by their employees, regardless of whether the actions are instituted directly against the employer by the employee or whether they are pursued indirectly by third party claimants such as

appellants. It is respectfully submitted that a denial of appellants' application for writs of certiorari is dictated.

REBUTTAL

In his petition for a writ of certiorari, counsel for appellants cites what he considers to be "important" reasons for the granting of the writ.

The appellants' argument is by analogy. They compare the "exclusivity provisions" of the L & H W Act to similar almost identical provisions contained in the Federal Employees Compensation Act (5 U.S.C. Sec. 8116 (C) (FECA), while ignoring the disanalogous character of the employment of tax-paying citizens in government service as opposed to the private sector of the economy. Appellants urge that inasmuch as the exclusivity provisions of each act have for all practical purposes the same verbiage and that the purpose of both federal compensation acts is the same — to "give speedy and certain relief to injured workmen or their dependents in the case of death —" that the two respective provisions should be accorded identical constructions or interpretations. Additionally they cite the conflict in authority among the federal circuits with regard to whether the United States Government (the employer under the FECA) can be subjected to third party claims for indemnification despite the existence of the provision of that Act barring direct actions by its employees. Appellants apparently assume that by resolving this conflict among the circuits concerning the breadth of the exclusive remedy provisions of the FECA in favor of recovery by tort

feasors of indemnity or contribution in tort from the federal fisc, this Honorable Court can at the same time work a "reasonable" construction of the exclusivity provisions of the L & H W Act which would allow recovery on the third party demands against appellee.

Thus it is apparently the contention of the appellants that the court should adopt an interpretation similar to that given by some courts to the FECA, which is however, a different statute passed under a different act with different purposes. Although both acts are in essence federal compensation acts, the L & H W Act covers private employers in private industry while the FECA applies solely to the United States Government as employer. Further, it is submitted that the cases principally relied upon by the appellants in interpreting the FECA exclusivity provisions can be readily distinguished.

Specifically, Bettis, the manufacturer and its insurer, rely upon the *Drake* and *Weyerhaeuser* cases (amply briefed and cited in appellants' application for writs), as the principal cases which indicate that actions for indemnification in tort are not barred by the exclusivity provisions of the FECA. However, a close analysis of these two cases will reveal, we submit, that actually there is no conflict between these two decisions interpreting the exclusive remedy provision under the FECA and the decisions already noted interpreting the exclusive remedy provision of the L & H W Act, for, factually, there is no similarity between the indemnitor and indemnitee in those cases with the relationship between Bettis and Wheatley in this case. What distinguishes *Drake* and *Weyerhaeuser* from this case is that there is *no* independent legal relationship between Bettis and Wheatley the breach of which would serve to form an

independent cause of action between the two whereas in both the *Drake* and *Weyerhaeuser* cases there was such an independent relationship. This was noted in the case of Panico v. Whiting Milk Company, et al v. United States, 335 F. Supp. 315 (U.S. D.C., Mass. 1971) which it is submitted represents a correct interpretation and application of the *Drake* and *Weyerhaeuser* cases.

Panico involved an action for injuries received by the driver of one mail truck in an accident in Massachusetts involving two mail trucks and a milk truck owned by the defendant milk company and operated by the defendant driver who in turn filed a third party complaint against the United States as the employer of the driver of the other mail truck for tort indemnity and contribution. The District Court held that the United States, by paying compensation benefits to the original plaintiff, the mail truck driver who was injured by the joint actions of the milk truck driver and the other mail truck driver, was clothed with immunity under 5 U.S.C.A. Section 8116 (C), the exclusive remedy provision of the FECA Act. Hence the third party action against the United States was dismissed. In so holding, the Court stated:

> "There are two grounds for the court's order of dismissal of the third-party action. The first is that allowance of the third-party claim would avoid the exclusiveness of plaintiff Panico's remedy under 7 (b) of the Federal Employees Compensation Act, 5 U.S.C. 8116 (c). This is a question as to which there has been a conflict of authority among the Courts of Appeals for various circuits. See, e.g., *United Air Lines, Inc. v. Wiener*, 9 Cir., 1964, 335 F. 2d 379, 402-

404. and *Wallenius Bremen G. m.b.H. v. United States, 4 Cir., 1969, 409 F. 2d 994, Murray v. United States, 1968, 132 U.S.App. D.C. 91, 405 F. 2d 1361.* There appears to be little dispute that the government is not liable for contribution because payment of compensation benefits to a federal employee extinguishes the government's liability to him; and accordingly the motion to dismiss is allowed without further discussion as to counts 2 and 4. The division of authority relates to the third-party plaintiffs' claims under counts 1 and 3 for indemnity. We believe that the decisions of the Court of Appeals for the Ninth Circuit, in *United Air Lines, Inc. v. Wiener, supra,* and *Wien Alaska Airlines, Inc. v. United States, 9 Cir., 1967, 375 F. 2d 736,* state the better rule.

The Supreme Court decisions on which the third-party plaintiffs rely, *Weyerhaeuser S.S. Co. v. United States, 1963, 372 U.S. 597, 83 S. Ct. 926, 10 L. Ed. 2d 1,* and *Treadwell Const. Co. v. United States, 1963, 372 U.S. 772, 83 S. Ct. 1102, 10 L. Ed. 2d 136,* reversing *Drake v. Treadwell Const. Co., 3rd Cir., 1962, 299 F. 2d 789,* are distinguishable. Both cases involved tort feasors who were related to each other independently of the accident causing personal injuries, in the *Weyerhauser* case by the historic admiralty rule of divided damages and in the *Treadwell* case by the contract between the company and the United States for the manufacture of a steel expansion tank."

The Fifth Circuit has recognized that the distinction made by the Court in *Panico* is a valid one and that its

interpretation of the significance of the *Weyerhaeuser* case is correct. The correctness of the distinction made in *Panico* was recognized in *Empire Seafoods, Inc. v. Anderson, 398 F. 2d 204 (1968)*, a case involving the question of divided damages between a ship owner who struck a bridge and the contractor building the bridge. The contractor pointed to the exclusive remedy provision provided in the Florida Workmen's Compensation Act and the exclusive remedy provision provided for in the L & H W Act, Section 905(a) and took the position that it could not be burdened with a liability for injuries sustained by its employees in addition to the liability imposed upon it by the Compensation Act by using the divided damage rule inasmuch as to do so would be to permit something to be done indirectly which could not be done directly, citing any number of longshoremen and tortfeasor cases where the employer escaped liability to a third party for injuries to an employee by virtue of the exclusive remedy provision where the party claiming either contribution or indemnity in tort did not have the benefit of a divided damages rule. In disposing of this contention the Fifth Circuit Court of Appeals stated that this was a case which required the application of a divided damage rule inasmuch as it was a collision between a vessel and a bridge under construction, citing the *Weyerhaeuser* case. It then stated:

> "The longshoremen and joint tortfeasor cases relied upon by Cleary are not helpful because the legal relationships of the parties in those cases and the relationship in the case sub judice, involving a maritime collision between a vessel and a bridge, are not comparable and cannot be analogized."

By the same token, if longshoremen and joint tortfeasor cases and cases for indemnity in tort cannot be analogized to a maritime collision case in which the divided damages rule is applicable, then logically maritime collision cases are not analogous and comparable to platform accident cases on the outer continental shelf involving the application of Louisiana surrogate law.

It is submitted that such decisions as *United Air Lines, Inc. v. Wiener, 335 F. 2d 379 (9 C.C.A., 1964); Wien Alaska Air Lines, Inc. v. U.S., 375 F. 2d 736 (9 C.C.A., 1967)* and *Newport Airpack, Inc. v. U.S., 419 F. 2d 342 (1 C.C.A., 1969)* represent a true and correct interpretation of the significance of the *Weyerhaeuser* and *Drake* decisions and their significance regarding the exclusive remedy provision in the FECA Act. These cases clearly demonstrate that those few cases so heavily relied upon by Bettis herein resulted from an erroneous interpretation of the meaning of the *Weyerhaeuser* and *Drake* cases, an interpretation at variance with the Fifth Circuit's understanding and interpretation of the effect of the *Weyerhaeuser* and *Drake* cases, as exemplified by its comments on that jurisprudence in the *Empire Seafoods* case just discussed. For example, *United Air Lines, Inc. v. Wiener*, cited *supra*, involved 31 cases arising out of a mid-air collision between a commercial airliner and a United States Air Force jet fighter. The crew of the airliner was found to be negligent as well as the pilot of the jet fighter. The question then became whether the airline was entitled to indemnity from the United States with regard to the deaths of government employees aboard the airliner at the time of the mid-air collision. The District Court denied either contribution or tort in-

demnity because of the exclusive remedy provision of the FECA Act which clothed the United States with immunity from tort liability with respect to these deceased employees or their heirs. The airline appealed the denial of its claim for tort indemnity or contribution against the United States with respect to the nine government employee cases, contending that the *Weyerhaeuser* case demanded a different decision, one which would permit the airline to obtain tort indemnity from the United States in spite of the exclusive remedy provision of the FECA Act. In overruling that contention and affirming the District Court's action, the Court of Appeal, Ninth Circuit, made a penetrating analysis of *Weyerhaeuser* and its effect and compared and contrasted the decisions under the L & H W Act. It stated:

> "The Supreme Court in *Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 83 S. Ct. 926, 20 L.Ed.2d 1 (1963)*, held that the express provisions of the statute do not qualify the historic admiralty rule of divided damages in mutual fault collision. The admiralty rule of divided damages is to be distinguished from the rule of indemnity urged upon us by *United* since under admiralty law there arises from a collision involving mutual fault the right to apportionment of all damages resulting therefrom, including personal injuries, cargo damage, and damage to the ships. The divided damage rule is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured. *On the other hand neither contribution nor indemnity may be awarded without the support of liability on the part of the in-*

demnitor to the person injured. The courts have consistently held that in the absence of an express or implied contract of indemnity or in the absence of the indemnitor's liability to the injured party, there can be no recovery for indemnity. Christie v. Powder Power Tool Corp., 124 F. Supp. 693 (D.D.C. 1954); *Terminal R. Ass'n of St. Louis v. United States*, 182 F. 2d 149 (8th Cir. 1950), cert. den. 340, 825, 71 S. Ct. 60, 95 L. Ed. 606; *Slattery v. Marra Bros., supra; Lo Bue v. United States*, 188 F. 2d 800 (2d Cir. 1951); *Drumgoole v. Virginia Electric & Power Co.*, 170 F. Supp. 824 (E.D. Va. 1959).

As pointed out in the Weyerhaeuser opinion 372 U.S. 602, 83 S. Ct. 926, the exclusive liability provision of the Federal Employees' Compensation Act is indistinguishable from Section 5 of the Longshoremen's and Harbor Worker's Act, 33 U.S.C. 905. In construing this statute the courts have held that an employer may be liable for indemnity to another on the basis of an express or implied contract of indemnity but that in the absence of a contractual duty, the exclusive liability provision removed the underlying liability necessary for indemnity. *American Mutual Liability Insurance Co. v. Matthews*, 182 F. 2d 322 (2nd Cir. 1951); *Lo Bue v. United States, supra; Crawford v. Pope & Talbot*, 206 F. 2d 784 (3rd Cir. 1953); *Brown v. American-Hawaiian S.S. Co.*, 211 F. 2d 16 (3rd Cir. 1954). The courts said in *Crawford v. Pope & Talbot, supra*, 206 F. 2d at 792:

"Authority is lacking 'for saying that differences in the degrees of fault (active or

> passive negligence) between two tortfeasors will without more strip one of them, if he is an employer, of the protection of a compensation act; and we are at a loss to see any tenable principle which can support such a result.' *Slattery v. Marra Bros.*, 2 Cir., 1951, 186 F. 2d 134, 139."

Appellants contend on Page 7 of their petition that in *Ryan Stevedoring Company v. Pan-Atlantic S. S. Corporation*, 350 U.S. 124, 76 Supreme Court 232, 1956, "[T]his Court held that were the injuries to the longshore-employee occurred through the fault of the employer, the third party ship owner has a right to receive full reimbursement from the stevedoring employer, regardless of the existence of the "exclusive liability" provision of the L & H W Act." Appellants took several statements from the text of the Ryan opinion, setting them forth in support of their averment that the exclusive remedy provisions of the L & H W Act apply only to the "employee, and those claiming under or through him." They neglected, however, to quote the following statements from the opinion rendered therein. Thus it was also said by this court:

> "The Act [L & H W Act] nowhere expressly excludes or limits a shipowner's right, as a third person, to insure itself against such a liability either by a bond of indemnity, or the contractors own agreement to save the shipowner harmless. Petitioner's agreement in the instant case amounts to the latter, for, as will be shown, it is a contractual undertaking to

stow the cargo "with reasonable safety" and thus to save the shipowner harmless from petitioners' failure to do so.

"In the face of a formal bond of indemnity this statute clearly does not cut off a shipowner's right to recover from a bonding company the reimbursement that the indemnitor, for good consideration, has expressly contracted to pay. *Such a liability springs from an independent contractual right. It is not an action by or on behalf of the employee and it is not one to recover damages, "on account of" an employee's "injury or death".* It is a simple action to recover under a voluntary and self-sufficient contract, a sum measured by foreseeable damages occasioned to the shipowner by the injury or death of a longshoreman on a ship.

"While the Compensation Act protects a Stevedoring Contractor from actions brought against it by its employees on account of a contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo properly.

"The shipowner's action here is not founded upon a tort or upon any duty which the Stevedoring Contracting was to its employee. The third party complaint is grounded upon

> the contractors breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner. Accordingly the shipowner's action for indemnity on that basis is not barred by the Compensation Act."

Thus, it is clear that the basis for the Court's decision in *Ryan* is that there was an independent contractual undertaking running from the contractor to the shipowner, which provided the basis for the shipowner's action by indemnity against the contractor. The implication from this case is that in the absence of such a contractual or consensual undertaking, the shipowner's claim for indemnity against the contractor-employer would have been barred by virtue of the provisions of the L & H W Act. The *Ryan* case, in fact, stands for the proposition that in order for there to be a right of indemnity or contribution in favor of the third parties, there must be an independent contractual right exercised against the employer in such cases. In the instant case, there is no such contractual relationship between Bettis, the manufacturer of the allegedly faulty actuator, and Wheatley, the assembler of the launch system which incorporated the actuator. There is no warranty or contractual undertaking running from Wheatley to Bettis. If anything there is an implied contractual warranty of fitness of the actuator running from Bettis, which manufactured the actuator which was installed in the Wheatley Launch System, in favor of Wheatley, its vendee!

CONCLUSION

As this court recognized just last year in the *Cooper Stevedoring* case, Congress in 1972 re-emphasized its determination to further limit the employer's liability to third parties while at the same time increasing his already substantial burdens and obligations for benefits to his employees under the L & H W Act. It is most respectfully urged and contended that to grant the relief petitioned for herein by Bettis Corporation and its insurer would only serve to thwart the acknowledged policy of the Congress of the United States in this respect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of December, 1975.

TIMOTHY J. McNAMARA